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SUPREME COURT OF THE UNITED STATES.

In the Matter

of

The Petition of the East River Towing Co., Inc., for Limitation of its Liability as Owner of the Steamtug *Edward*, her engines, etc.

BRIEF FOR PETITIONER-APPELLANT.

Statement.

This matter, which involves a petition for limitation of liability by a tug owner, comes before the court on a certificate sent under and in pursuance of Section 239 of the judicial code to this court by the United States Circuit Court of Appeals for the Second Circuit.

The certificate is reported below as *The Edward*, 291 Fed. 1017.

This certificate was sent up after argument had been heard of the appeal by the petitioner, East River Towing Company, Inc., to the said Circuit Court of Appeals.

The appeal was from a decree, as resettled, of the United States District Court for the Eastern District of New York, by which the District Court, sitting in

admiralty, had vacated, in respect of the state court action hereinafter mentioned, the usual stay of outside proceedings which this court has held, in *The San Pedro,* 223 U. S. 365 (1912), to be an inherent and necessary part of all petitions for limitation of liability.

The decision is reported below as *The Edward,* 294 Fed. 686.

1. *The Facts.*

The controversy out of which the limitation proceeding arose had its origin in the sinking of the steamtug *Edward,* with the loss of several lives, in New York harbor on August 2nd, 1922.

Among those killed was the master of the tug, one Thomas McCaffrey, whose administratrix, on or about October 2nd, 1922, brought an action against this petitioner in the Supreme Court of the State of New York, County of Kings, to recover damages resulting from his death.

On or about December 5th, 1922, this petitioner instituted proceedings in the United States District Court, Eastern District of New York, for limitation of its liability as owner of the said tug, pursuant to the provisions of the limited liability acts and the rules in admiralty prescribed by this court in respect of such proceedings.

On the same day, after proceedings regular under the statutes and rules above referred to, an order issued out of said court restraining all further prosecution of the said state court action.

On January 27th, 1923, application having been made by the plaintiff in the said state court action, a decree issued out of said District Court vacating the said restraining order of December 5th, 1922. *The Edward*, 294 Fed. 686.

On February 9th, 1923, application having been made by the petitioner herein, the said decree of January 27th, 1923, was resettled.

The decree, as resettled, provided:

> "ORDERED, it appearing that Congress, by the enactment of the Act of June 5th, 1920, commonly known as the Jones Act, intended to change the law with respect to limitation of liability to the extent of allowing a trial by a jury to said plaintiff by making the provisions regulating such limitation inapplicable to a case falling within the provisions of said Act of June 5th, 1920, that the said motion be and hereby is in all things granted, and that the said order entered herein on December 5th, 1922, restraining the further prosecution of the action, pending in the Supreme Court of New York, County of Kings, wherein Elizabeth McCaffrey as administratrix of the goods, chattels and credits of Thomas McCaffrey deceased is plaintiff and the East River Towing Co., Inc., is defendant, be and the same hereby is vacated and set aside."

From the decree as thus resettled the petitioner took its appeal, out of which grew the Certificate now under argument in this court.

2. *The Questions Certified.*

The questions certified to this court by the Circuit Court of Appeals are as follows:

> "(1) If an action at law be brought such as is described in Merchant Marine Act 1920 Sec. 33, can the prosecution thereof be enjoined by the injunction provided for in Admiralty Rule 51?
>
> "(2) Has the Merchant Marine Act 1920, Sec. 33, impliedly repealed the statute regarding limitation of liability of ship owners so far as claims or suits based on personal injuries to or death of seamen are concerned?" *Record*, page 2.

It may be observed parenthetically that, as applied to the particular case now before this court, these questions as framed by the Circuit Court of Appeals do not deal with three further questions which naturally will present themselves in such a litigation and which appellant believes have not been passed upon by this court:

> (1) Whether a plaintiff seeking to sue under the act in question must signify his election by appropriate wording in the complaint.
>
> (2) Whether the master of a vessel is a seaman within the meaning of the said act (See U. S. Comp. St., 1918, Section 8392).
>
> (3) Whether an action brought under the said act may properly be instituted in some forum other than a federal court (See *Wenzler* v. *Robin Line S. S. Co.*, 277 Fed. 812; *Lorang* v. *Alaska S. S. Co.*, 298 Fed. 547; *The Davenport*, 1924 American Maritime Cases, 758, decided by the Supreme Court of

California, March 25, 1924; *Patrone* v. *Howlett*, 237 N. Y. 394; all of which, except the New York case, hold that suit may properly be instituted only in a federal court).

These questions were not presented to the Circuit Court of Appeals on the argument of the appeal taken to that court in this proceeding, and appellant does not seek to present them here, as they do not seem to be embraced within the certified questions. They are called to the attention of this court merely for the reason that they are questions sure to arise under Section 33 of the Merchant Marine Act, and, therefore, perhaps appropriate to have in mind whilst considering the certified questions.

Appellant contends:

1. That the first certified question should be answered in the affirmative;

2. That the second certified question should be answered in the negative;

3. That the Merchant Marine Act of 1920, known as the Jones Act, did not change the law with respect to limitation of liability to any extent whatsoever; and

4. That the said District Court erred in vacating the order restraining prosecution of the said state court action.

FIRST POINT.

THE ACTS OF MARCH 3, 1851, OF JUNE 26, 1884, AND OF JUNE 19, 1886 (REVISED STATUTES, SECTIONS 4282-4289), CONSTITUTED A STATUTORY ADOPTION INTO OUR LAW OF A REMEDY BY WHICH SHIPOWNERS COULD INVOKE THE ANCIENT AND ALMOST UNIVERSAL MARITIME DOCTRINE OF LIMITATION OF LIABILITY.

THE PURPOSE OF THE LAW WAS TO ENCOURAGE THE BUILDING OF AND INVESTMENT IN SHIPS, AND AS A CONSEQUENCE IT IS TO BE LIBERALLY CONSTRUED AND FULLY ENFORCED.

1. *The Limited Liability Law and its Historical Background.*

The Act of March 3, 1851, commonly known as the Limited Liability Law, contains the following provision (R. S., Section 4283; U. S. Comp. St., 1918, Section 8021):

> "The liability of the owner of any vessel, for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, lost, damage, or forfeiture, done, occasioned, or incurred, without the privity, or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel and her freight then pending."

The historical development of the principle of limitation of a shipowner's liability is treated at some length in the opinions of this court in:

Norwich Company v. *Wright*, 13 Wall. 104;
The Main v. *Williams*, 152 U. S. 122.

The civil law and the common law made the owner responsible to the whole extent of damage caused by the wrongful act or negligence of the master or crew.

It is difficult to say with accuracy when and where the limitations of liability universal in modern maritime law originated. But however they did originate, they had become firmly established among the leading maritime nations of Europe, possibly in the Fourteenth and certainly by the Seventeenth Century. Limitations of liabilities substantially similar to those found in the modern laws are found in the *Consolato del Mare*, the writings of *Vinnius* and the Hanseatic Ordinance of 1644.

Annexed hereto as *Appendix I* hereof is a memorandum on the "*Historical Development of the Doctrine of Limitation of Liability of Shipowners.*"

This memorandum is appended, in case the court should be interested in observing from it that the shipowner's limitation of liability has had almost universal application for many centuries past, and is the law among the maritime nations of the world at the present time.

Indeed, the doctrine seems to have been almost universal since commerce became general in early mediaeval times.

It is an interesting reflection that maritime law seems to have been uniform among the maritime nations in the early times, and that, although this uniformity was temporarily interfered with by the growth of the principle of nationality, there seems now to be a strong trend back again to the ancient uniformity.

The French *Ordonnance de la Marine* of 1681 declares that the owners of the ship shall be answerable for the acts of the master, but shall be discharged therefrom upon relinquishing the ship and freight. A similar provision appears in the Ordinance of Rotterdam of 1721.

The provisions of the French *Ordonnance* of 1681 were carried into the modern *Code de Commerce,* the German Marine Code, the Code of the Netherlands, the Belgian Code, the Italian Code, the Imperial Russian Code, the Spanish Code, the Portuguese Code, the Brazilian Code, the Argentine Code and the Chilean Code.

The earliest legislation in England upon the subject is found in the act of 7 George II, passed in 1734.

The earliest American legislation upon this subject is found in a statute of Massachusetts passed in 1818, based substantially upon the statute of George II. It was followed by an act of the legislature of Maine in 1821, copied from the statute of Massachusetts.

The first act of Congress adopting this universal doctrine of limitation of liability of shipowners was passed by Congress on March 3, 1851.

The reason for the passage of the Act, as shown by

the debates on it in Congress, was that at that time the United States was the largest ship-owning nation and desired to have laws as favorable to shipowners as those of England, France and the other European nations.*

In the language of this court in *The Main* v. *Williams*, 152 U. S. 122, 128:

> "The attention of Congress does not seem to have been called to the necessity for similar legislation until 1848, when the case of *The Lexington*, reported under the name of the *New Jersey Steam Nav. Co.* v. *Merchants Bank*, 6 How. 344, was decided by this court. In this case the owners of a steamboat, which was burnt on Long Island Sound, were held liable for about $18,000 in coin, which had been shipped upon the steamer and lost. In consequence of the uneasiness produced among shipowners by this decision, and for the purpose of putting American shipping upon an equality with that of other maritime nations, Congress, in 1851, enacted what is commonly known as the Limited Liability Act. * * *"

The text of the Act of March 3, 1851, and of the Acts of June 26, 1884 and of June 19, 1886, amendatory thereof and supplementary thereto are given as *Appendix II* hereof.

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* The debates precedent to the passage of the Act of Mar. 3, 1851, are to be found in the *Congressional Globe* which covers the 2nd session of the 31st Congress, 1850, 1851.

The debates in the Senate are to be found at the following pages of the *Congressional Globe*, 1850, 1851: 317, 331, 479, 713-738, on which page the record of the passage of the Act by the Senate occurs.

In the House of Representatives the law was discussed, *Congressional Globe*, 1850, 1851, at 776, passed at 779.

A concurrent report was adopted by the Senate and the House on March 3, 1851. *Congressional Globe*, page 816.

The benefit of the Limited Liability Law, which always had covered seagoing vessels, was, by amendment of June 19, 1886 (24 Stat. 80; U. S. Comp. St., 1918, Section 8027), extended to

> "• • • all vessels used on lakes or rivers or in inland navigation, including canal-boats, barges, and lighters."

Under the act of June 26, 1884 (C. 121, Section 18; 23 Stat. 57; U. S. Comp. St. 1918, Section 8028), held to be *in pari materia* with the act of 1851, the limitation of a shipowner's liability was extended to include liabilities arising *ex contractu* or from nonmaritime torts.

Richardson v. *Harmon*, 222 U. S. 96.

That the Limited Liability Law is applicable to cases of personal injury and death, as well as to cases of loss of or injury to property, is well established.

Butler v. *Boston Steamship Co.*, 130 U. S. 527;
Craig v. *Continental Ins. Co.*, 141 U. S. 638.

> "• • • due regard for the broad terms and dominant force of Section 4283 requires that Sections 4284 and 4285 be construed as authorizing a proceeding for limitation of liability whether there be a plurality of claims or only one • • •." 233 U. S., 351.

White v. *Island Transportation Co.*, 233 U. S. 346, 351;
Richardson v. *Harmon*, 222 U. S. 96.

2. *The Purposes of the Doctrine of Limited Liability of Shipowners and the Reason behind it.*

The Limited Liability Law evidences the manifest policy of Congress to encourage investment in ships. This policy has been recognized both in the older and in the recent decisions of this and other federal courts.

Norwich Company v. *Wright*, 13 Wall. 104;
The Scotland, 105 U. S. 24;
Providence & N. Y. S. S. Co. v. *Hill Manufacturing Co.*, 109 U. S. 578;
Butler v. *Boston Steamship Co.*, 130 U. S. 527;
Richardson v. *Harmon*, 222 U. S. 96, 104;
Southern Pacific Co. v. *Jensen*, 244 U. S. 205, 218.

In *Norwich Company* v. *Wright*, 13 Wall. 104, is outlined the history of limitation of liability of shipowners, and the reasons underlying the doctrine.

Mr. Justice Bradley, speaking for this court, after referring to the history of the doctrine in other nations and the acts passed by them to support it, said at page 119:

> "In the light of all this previous legislation, the Act of Congress was passed in 1851. * * * * * * * * * * * *
>
> The great object of the law was to encourage shipbuilding and to induce capitalists to invest money in this branch of industry. Unless they can be induced to do so, the shipping interests of the country must flag and decline. Those who are willing to manage and work ships are gen-

erally unable to build and fit them. They have plenty of hardiness and personal daring and enterprise, but they have little capital. On the other hand, those who have capital, and invest it in ships, incur a very large risk in exposing their property to the hazards of the sea, and to the management of seafaring men, without making them liable for additional losses and damage to an indefinite amount. * * * The public interests require the investment of capital in shipbuilding, * * *" *Page* 121.

In *The Scotland*, 105 U. S. 24, this court again speaking through Mr. Justice Bradley said, at page 31:

"* * * Whenever the public interest requires the employment of a great aggregation of capital, exposed to immense risk, some limitation of responsibility is necessary in order that men may be induced to contribute to the enterprise. As *Grotius* says, in reference to this very matter of shipowners, 'Men would be deterred from owning and operating ships, if they were subject to the fear of an indefinite liability for the acts of the master.' Jure B. & P., lib. 2, c. 11, s. 13."

This court there further stated at pages 30-31:

"* * * This statute declares the rule which the law-making power of this country regards as most just to be applied in maritime cases. * * *

"But it is enough to say that the rule of limited responsibility is now our maritime rule. It is the rule by which, through the Act of Congress, we have announced that we propose to administer justice in maritime cases * * *"

And as Mr. Justice Bradley states later in the leading case of *Providence & N. Y. S. S. Co.* v. *Hill Manufacturing Co.*, 109 U. S. 578 at page 588 (italics ours):

> "In these provisions of the statute we have sketched in outline a scheme of laws and regulations for the benefit of the shipping interest, the value and importance of which to our maritime commerce can hardly be estimated. Nevertheless, the practical value of the law will largely depend on the manner in which it is administered. If the courts having the execution of it administer it in a spirit of fairness, with the view of giving to ship owners the full benefit of the immunities intended to be secured by it, the encouragement it will afford to commercial operations (as before stated) will be of the last importance; *but if it is administered with a tight and grudging hand, construing every clause most unfavorably against the shipowner, and allowing as little as possible to operate in his favor, the law will hardly be worth the trouble of its enactment. Its value and efficiency will also be greatly diminished, if not entirely destroyed, by allowing its administration to be hampered and interfered with by various and conflicting jurisdictions.*"

In *The City of Norwich*, 118 U. S. 468, Mr. Justice Bradley, at page 504, in dealing with the question whether insurance moneys had to be surrendered, says:

> "We are not only satisfied that the law does not compel the shipowner to surrender his insurance in order to have the benefit of limited liability, but that a contrary result would defeat

the principal object of the law. That object was to enable merchants to invest money in ships without subjecting them to an indefinite hazard of losing their whole property by the negligence or misconduct of the master or crew, but only subjecting them to the loss of their investment * * *."

Later, in *Butler* v. *Boston Steamship Co.*, 130 U. S. 527, at page 549, he gives the ground of the law of limited liability of shipowners:

"* * * That ground is, that for the encouragement of ship-building and the employment of ships in commerce, the owners shall not be liable beyond their interest in the ship and freight for the acts of the master or crew done without their privity or knowledge. It extends to liability for every kind of loss, damage and injury. This is the language of the maritime law, and it is the language of our statute which virtually adopts that law. * * *"

And in 130 U. S. at page 550, he says:

"Various attempts have been made to narrow the objects of the statute, but without avail. It was first contended that it did not apply to collisions. This pretence was disallowed by the decision in *Norwich Company* v. *Wright*, 13 Wall. 104. Next it was insisted that it did not extend to cases of loss by fire. This point was overruled in the case of *Providence & New York Steamship Co.* v. *Hill Man'f'g Co.*, 109 U. S. 578. Now it is contended that it does not extend to personal injuries as well as to injuries to property. If this position can be maintained the value of the act, as an en-

> couragement to engage in the shipping business, will be very essentially impaired. The carriage of passengers in connection with merchandise is so common on the great highway between the old and new continents at the present day, that a law of limited liability, which should protect ship-owners in regard to injuries to goods and not in regard to injuries to passengers, would be of very little service in cases which would call for its application."

As to the purpose of the Limited Liability Acts, Mr. Justice White in *La Bourgogne*, 210 U. S. 95, at pages 120-121, quotes with approval the opinions of Mr. Justice Nelson and Mr. Justice Bradley in *Moore* v. *American Transportation Company*, 24 How. 1, 39, and *Providence & N. Y. S. S. Co.* v. *Hill Manufacturing Co.*, 109 U. S. 578, 589, respectively.

Richardson v. *Harmon*, 222 U. S. 96, is another late case in which the purpose and effect of these laws is dealt with at length. In that case, Mr. Justice Lurton makes the following pertinent remarks at pages 103-104:

> "* * * The avowed purpose of the original act was to encourage American investments in ships. This was accomplished by confining the owner's individual liability, when not the result of his own fault, in the instances enumerated, to his share in the ship. * * *"
>
> "In view of the manifest policy of Congress to further encourage the ship-owning industry and the very broad terms employed in this last legislation, we can but infer that the policy of the

Government was to confine the risk of an owner not personally at fault to his interest in the ship * * *."

In *Southern Pacific Company* v. *Jensen*, 244 U. S. 205, this court in holding that the New York Workmen's Compensation Law could not, under the Constitution, apply to injuries received on board vessels, mentioned the fact that the absolute liability under the Workmen's Compensation Law was

> "* * * not consistent with the policy of Congress to encourage investments in ships manifested in the Acts of 1851 and 1884 (Rev. Stats., §§4283-4285; Section 18, Act of June 26, 1884, c. 121, 23 Stat. 57) which declare a limitation upon the liability of their owners. *Richardson* v. *Harmon*, 222 U. S. 96, 104." *Page* 218.

In the recent case of *Capitol Transportation Company* v. *Cambria Steel Company*, 249 U. S. 334, the right to limit was denied to the owners on the ground they were privy to the unseaworthiness which was the cause of the loss and also had made personal contracts against which they were not entitled to limit. However, Mr. Justice Holmes in delivering the opinion of the court sounded a warning and said at page 336:

> "We very much appreciate the danger that the act should be cut down from its intended effect by too easy a finding of privity or knowledge on the part of owners, as also by too liberal an attribution to them of contracts as personally theirs. We are not disposed to press the law in those directions further than the cases go. * * *"

For the court's convenience, a list of the cases chronologically arranged in which this court has dealt with limitation of liability acts, is hereto annexed as *Appendix IV* hereof.

This long list of cases is eloquent proof that limitation of liability statutes play a most important part in our maritime law.

The quotations above given show that these statutes have for years been treated with the greatest hospitality by this court, because of the important public policy which lay behind their enactment.

SECOND POINT.

THE PROPER PROCEDURE FOR OBTAINING THE BENEFIT OF THE LIMITED LIABILITY LAW IS FULLY OUTLINED IN THE DECISIONS AND RULES OF THIS COURT. A LIMITATION OF LIABILITY PROCEEDING MUST NECESSARILY BE EXCLUSIVE IN ORDER TO GIVE THE SHIPOWNER THE REMEDY AND RELIEF INTENDED BY CONGRESS.

After one or two litigations arising under the Act of 1851 had reached this court, rules were passed by this court on May 6, 1872, laying down the procedure to be followed by shipowners for the enforcement of the remedies given to them by the Act of 1851. 13 Wall., page XII.

These old rules were amended on December 6, 1920, to take effect March 7, 1921. 254 U. S. 703.

For the convenience of the court the text of the amended rules which were in force at the time this case arose are appended hereto as *Appendix III.*

In *The San Pedro,* 223 U. S. 365, this court wrote at page 371:

> "* * * This court, in furtherance of the apparent purpose of Congress to limit the liability of vessel owners (Revised Statutes, Sections 4283-4285) has, by that rule, prescribed how an owner may avail himself of the benefit of the statute. *The very nature of the proceeding is such that it must be exclusive of any separate suit against an owner on account of the ship.* The monition which issues when the vessel has been surrendered, and a stipulation entered into to pay the value into court, requires every person to assert his claim in that case.
>
> "The appellant, owner of the *San Pedro,* appears to have proceeded strictly in compliance with the fifty-fourth admiralty rule. There was a due appraisement of the *San Pedro* and her pending freight, and a stipulation entered into, with sureties, for the value so appraised, and monition duly issued, requiring all persons to present their claims and make proof. *In that situation, the jurisdiction of the court to hear and determine every claim in that proceeding became exclusive. It was then the duty of every other court, Federal or State, to stop all further proceedings in separate suits upon claims to which the limited liability act applied."* (Italics are ours.)

In *Providence & N. Y. S. S. Co.* v. *Hill Manufacturing Co.*, 109 U. S. 578, this court wrote, at page 587:

> "The principal question in this case is, whether the institution of proceedings in the District Court of the United States, under the Act of 1851, for procuring a decree of limited liability of the owners of *The Oceanus*, the defendants in the present action, for the losses and injuries to goods on board of the vessel, superseded the prosecution of claims for the same losses and injuries in other courts. It seems to us that this must be the necessary effect of such proceedings, and that this results as well from the language of the law, as from its object and purpose."

In the case of *Norwich Company* v. *Wright*, 13 Wall. 104, this court wrote, at page 125:

> "The proper course of proceeding for obtaining the benefit of the Act would seem to be this: When a libel for damages is filed, either against the ship *in rem* or the owners *in personam*, the latter, whether with or without an answer to the merits, should file a proper petition for an apportionment of the damages according to the statute, and should pay into court, if the vessel or its proceeds is not already there, or give due stipulation for such sum as the court may, by proper inquiry, find to be the amount of the limited liability, or else surrender the ship and freight by assigning them to a trustee in the manner pointed out in the fourth section. Having done this, the ship owner will be entitled to a monition against all persons to appear and intervene *pro interesse suo*, and to an order restraining the prosecution of other suits.

> If an action should be brought in a state court, the ship owners should file a libel in admiralty, with a like surrender or deposit of the fund, and either plead the fact in bar in the state court, *or procure an order from the district court to restrain the further prosecution of the suit.* * * *" (Italics ours.)

Admiralty rule 51, after setting forth that a shipowner desiring to claim the benefit of limitation of liability under the Act of 1851 shall file a petition in the proper district court setting forth the facts and circumstances on which said limitation of liability is claimed, outlines the procedure incident thereto and provides that

> "* * * the said court *shall* also, on the application of the said owner or owners, make an order to restrain the further prosecution of *all and any* suit or suits against said owner or owners in respect to any such claim or claims." (Italics are ours.)

This rule was promulgated by this court on December 6, 1920 (254 U. S. 674)—shortly after the enactment of section 33 of the Merchant Marine Act of 1920 referred to in the certified questions.

This court had power delegated to it by Congress to promulgate the rule,* and by so doing expressed its deliberate judgment as to the procedure proper to be followed.

Providence & N. Y. S. S. Co. v. *Hill Manufacturing Co.*, 109 U. S. 578.

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* Act of August 23, 1842, Chap. 188, Section 6; 5 Stat. 518, Rev. Stat., §§862, 917, 918.

The effect of the Limitation of Liability Act, therefore, was the creation in the Admiralty Court of a remedy based on the theory that public policy requires that shipowners, whose vessels cause a great variety and extent of damage, shall be entitled to have a proceeding in a proper case wherein they may assemble all the persons who may have been damaged by any maritime disaster and require them to try out the case in concourse.

The theory of this proceeding is that, as there was one wrong committed by the shipowner, he is entitled to have a remedy somewhat analogous to the old Bill of Peace in equity to enable him to try out his liability as against everyone interested in the one proceeding.

Otherwise he would be called on perhaps to meet the different claims, some before juries, in different courts of different states, with a probable, or at least possible, variance of result.

When the extent of the damages and the number of cases involved in any great maritime disaster are remembered, it is easily seen that it is impracticable to deal with cases of this kind otherwise than by trying them as one with a concourse of all claimants in the limitation proceeding.

The most graphic instances showing the necessity of such proceedings are perhaps the cases of *La Bourgogne*, 210 U. S. 95, of *The Titanic*, 233 U. S. 718 and of *The Lusitania*, 251 Fed. 715, where hundreds of claims involving millions of dollars were made against the shipowner in many different states.

It would be a practical impossibility for a shipowner in the event of a disaster to handle cases in which several seamen had claims under §33 along the lines which have been outlined in decisions rendered by some of the lower courts.

For example, if each case by a seaman had to be tried separately by a jury, the result might very possibly be that in one case there would be a recovery against the ship and in another there would be a decision in the shipowner's favor.

If a limitation proceeding involving others than seamen was proceeding at the same time with seamen's cases at law, very possibly the court on the admiralty side might decide against the shipowner, and on the law side of the same court a judgment on a jury's verdict might go in favor of the shipowner, or *vice versa*.

These are some of the suggested possible results which would be extremely difficult to work out judicially in an orderly fashion.

The orderly and consistent administration of justice can be conserved only by trying out limitation proceedings by concourse of all claimants.

The injunction or stay is the only weapon by which process of round-up can be achieved.

In *The F. H. Marvin*, 1924 American Maritime Cases, 53, decided December 11, 1923, by the United States District Court for the Western District of Washington, a motion to vacate a stay of state court proceedings, on the ground that Section 33 of the Merchant Marine Act overrode a shipowner's remedy in limitation of liability, was properly denied.

The court there rightly held that the promulgation by this court, after Section 33 of the Merchant Marine Act of 1920 was passed by Congress, of the new admiralty rules of March 7, 1921, 250 U. S. 703, 705, was in effect subsequent legislation, which, so far as limitation of liability suits were concerned, constituted a reiteration of policy, and imposed on a district court sitting in admiralty the *duty* to issue an injunction provided for in those rules.

The procedural situation as to claims under Section 33 of the Merchant Marine Act, 1920, which has been created by the decisions of Judge Garvin in the present case, of Judge Learned Hand in the cases of *The El Mundo*, *The Frederick Luckenbach* and *The Hewitt*, 294 Fed. 577, and of Judge Partridge in the case of *In re Charles Nelson Co.*, 294 Fed. 926, is hopelessly confusing.*

In *The El Mundo*, the court was of the opinion that, even if there was left to the owner a right to limit,

> "the owner-employer must make his defense in the action at law, and that, if there are other claims on which he relies to reduce the plaintiff's recovery, he must prove those in that action. Such proof will not, of course, estop those other claimants, and in so far the owner remains in peril; but that is essential if he is deprived of his remedy of a concourse under Rev. Stat., Section 4285, and the rules * * *." *per* Learned Hand, J., 294 Fed. 581.

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* Since this brief was in type the case of *In Re Charles Nelson Co.* has been reversed by the Circuit Court of Appeals for the Ninth Circuit in an opinion which supports the contentions made in this brief. A copy of this opinion is hereto annexed as *Appendix VII* hereof.

The confusion attendant upon the adoption of such a theory, which would compel an owner with a total of many claims against him to prove all the other claims against himself on the trial of each and every one of the claims composing the total, is so manifest as hardly to require demonstration.

If, for example, there is a case where there are 20 or 30 seamen maintaining separate actions at law as in the case of *The Hewitt*, 294 Fed. 577, it would be practically impossible to raise the question of limitation of liability in one of these jury cases, as Judge Hand has suggested, without admitting liability in respect of all the other cases.

The situation would be quite hopeless and in respect of such claims limitation of liability would be practically destroyed.

In the case at bar, upon resettlement of the decree of January 27th, 1923, and after that recital in the proposed decree setting forth that Congress by the Jones Act intended to change the law with respect to limitation of liability, Judge Garvin inserted the words "*to the extent of allowing a trial by a jury to said plaintiff.*" As appellant views this alteration, it indicates an interpretation of the law which is wholly inconsistent with the ruling expressed by the resettled decree. The words seem to reveal an opinion of the court which is far less sweeping than the decision, an opinion only that a claimant is entitled to have his damages assessed by a jury.

In order to remind the court of the usual steps taken in a limitation proceeding and to illustrate its compli-

cated nature and the practical necessity of having all the claimants in concourse, we have drawn up and annexed to this brief a memorandum detailing the steps in such a proceeding, as *Appendix V* hereof.

It is somewhat unusual to have all the practice proceedings in limitation set forth in a record on appeal, because generally by the time the appeal comes most of the practice questions have become unimportant. In the case of *La Bourgogne*, 210 U. S. 95, however, the transcript of record on file in this court seems to show most, if not all, of the practice papers referred to in *Appendix V*.

It is submitted that a petition for limitation of liability is necessarily an exclusive remedy, and that trial of all the issues in concourse in an admiralty court is of the essence thereof.

THIRD POINT.

THE MERCHANT MARINE ACT OF 1920, COMMONLY KNOWN AS THE JONES ACT, DID NOT CHANGE THE LAW PERMITTING SHIPOWNERS TO LIMIT THEIR LIABILITY.

1. *The Purpose of the Merchant Marine Act of 1920.*

The Merchant Marine Act of 1920 was passed as expressed in its preamble for the primary purpose of developing and encouraging and maintaining a United States Merchant Marine. The title of the Act and its

preamble express this purpose as clearly as words can. They are as follows:

"An Act to provide for the promotion and maintenance of the American merchant marine, to repeal certain emergency legislation, and provide for the disposition, regulation, and use of property acquired thereunder, and for other purposes.

"BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That it is necessary for the national defense and for the proper growth of its foreign and domestic commerce that the United States shall have a merchant marine of the best equipped and most suitable types of vessels sufficient to carry the greater portion of its commerce and serve as a naval or military auxiliary in time of war or national emergency, ultimately to be owned and operated privately by citizens of the United States; and *it is hereby declared to be the policy of the United States to do whatever may be necessary to develop and encourage the maintenance of such a merchant marine*, and, in so far as may not be inconsistent with the express provisions of this Act, the United States Shipping Board shall, in the disposition of vessels and shipping property as hereinafter provided, in the making of rules and regulations, and in the administration of the shipping laws keep always in view this purpose and object as the primary end to be attained." (Italics ours.)

Section 2, in which there were provisions repealing certain other acts and parts of acts, does not mention the limitation of liability statutes.*

2. *Section 33 of the Merchant Marine Act and its Effect on Seamen's Rights.*

Section 33 of the Jones Act (Merchant Marine Act of June 5, 1920; U. S. Comp. St., 1923 Supp., Section 8337a; 41 Stat. 1007) reads as follows:

"Section 33: That Section 20 of such Act of March 4th, 1915, be, and is, amended to read as follows:

'Section 20. That any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action

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* The repealing provisions are as follows:

"Sec. 2 (a) That the following Acts and parts of Acts are hereby repealed, subject to the limitations and exceptions hereinafter, in this Act, provided:

(1) The emergency shipping fund provisions of the Act entitled 'An Act making appropriations to supply urgent deficiencies in appropriations for the Military and Naval Establishments on account of war expenses for the fiscal year ending June 30, 1917, and for other purposes,' approved June 15, 1917, as amended by the Act entitled, 'An Act to amend the emergency shipping fund provisions of the Urgent Deficiency Appropriation Act, approved June 15, 1917, so as to empower the President and his designated agents to take over certain transportation systems for the transportation of shipyard and plant employees, and for other purposes,' approved April 22, 1918, and as further amended by the Act entitled, 'An Act making appropriation to supply deficiencies in appropriations for the fiscal year ending June 30, 1919, and prior fiscal years, on account of war expenses, and for other purposes,' approved November 4, 1918:

(2) Section 3 of such Act of April 22, 1918;

(3) The paragraphs numbered 2 and 3 under the heading 'Emergency shipping fund' in such Act of November 4, 1918; and

(4) The Act entitled 'An Act to confer on the President power to prescribe charter rates and freight rates and to requisition vessels, and for other purposes,' approved July 18, 1918.

(5) Sections 5, 7, and 8, Shipping Act, 1916."

for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.' "

It is observable at this point that the statute properly applies only to *American* ship owners owing to its provisions as to venue.

The first provision of this section is that any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury.

Under the general maritime law, in case of illness or injury, a seaman may recover wages, maintenance and cure. This right exists irrespective of his or the owner's negligence, and will be denied only in case of his willful misconduct.

If his injury flows from the owner's negligent failure to furnish a seaworthy ship, or from a failure to furnish proper medical or surgical attendance, the seaman may

recover full indemnity, except as his recovery may be diminished by contributory negligence or possibly in some cases barred by assumption of risk.

The old maritime law may be enforced in either a federal or a state court, with a trial by jury if the plaintiff chooses to bring his action in the state court or on the law side of the federal court.

Carlisle Packing Co. v. *Sandanger*, 259 U. S. 255;
Chelentis v. *Luckenbach S. S. Co.*, 247 U. S. 372;
The Iroquois, 194 U. S. 240;
The Osceola, 189 U. S. 158;
Scarff v. *Metcalf*, 107 N. Y. 211.

Even before the Jones Act, then, under circumstances involving fault attributable to the owner, a seaman could have the benefit of trial by jury and recover full indemnity. This was a right to "maintain an action for damages at law, with the right of trial by jury."

The Jones Act in terms gives this same right, but there is nothing in the wording of the act to indicate that the right and its exercise are to be absolute and free of the restrictions imposed by the Limited Liability Law, enacted by Congress more than seventy years ago.

The purpose of this phrasing was obviously to make clear at least that federal courts sitting on the common-law side were to take cognizance of the new maritime rule laid down in the statute.

Thus in the first part of §33 there is not anything new.

The striking innovation furnished by §33 is contained in the provision making applicable "in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees."

This court has made clear the significance of this reference in *Panama Railroad Company* v. *Johnson*, 264 U. S. 375, where it said at page 391:

> "• • • The reference, as is readily understood, is to the Employers' Liability Act of April 22, 1908, c. 149, 35 Stat. 65, and its amendments • • •."

The Federal Employers' Liability Act abolishes the defense of fellow servant, and that of assumption of risk "in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee" (35 Stat. 66; Comp. St. §8660), and provides that contributory negligence shall diminish but not bar a recovery.

In its opening paragraph, it provides (U. S. Comp. St., 1918, Section 8657; 35 Stat. 65):

> "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the

States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, tracks, roadbed, works, boats, wharves, or other equipment. (April 22, 1908, c. 149, Section 1, 35 Stat. 65.)"

Before the enactment of §33 of the Merchant Marine Act a seaman's action was not barred by contributory negligence; and the defense of assumption of risk had been largely if not entirely whittled away, for the reason that a seaman acting under orders cannot be deemed voluntarily to assume a risk which he is bound to undertake.

Those two features of the Federal Employers' Liability Act, as applied to seamen, would seem, therefore, to constitute a mere statutory declaration of principles already applicable to seamen's cases.

The outstanding feature of the act which materially changes or purports to change the rights of a seaman is the provision abolishing the fellow servant rule as a

defense. This had been ineffectually attempted in §20 of the Seaman's Act. *Chelentis* v. *Luckenbach S. S. Co.*, 247 U. S. 372.

That feature has no relation to the principle involved in the statute of 1851 limiting the aggregate amount of recovery against a ship owner to the value of the vessel and pending freight.

The two principles do not conflict. Both continue in force at the same time. Each has its own sphere of operation.

One forms a part of the rules by which is determined the presence or absence of legal liability on the part of the employer; the other relates to the aggregate amount that an employer who has been found legally liable shall be made to pay.

The Federal Employers' Liability Act authorizes an action by the injured employee or, in case of his death, by his personal representative. No right to trial by jury is expressly given, but must be implied from the language of the provision that "contributory negligence shall not bar a recovery, but the damages shall be diminished *by the jury*," etc. (Comp. St. 1918, Section 8659; 35 Stat. 66). These last mentioned provisions are substantially identical with the express provisions of the Jones Act.

The Circuit Court of Appeals for the Second Circuit has held, in *The Passaic*, 204 Fed. 266, that the Federal Employers' Liability Act does not by implication repeal the statutory provisions permitting shipowners to limit

their liability, or affect the right of the owner to maintain proceedings for such limitation in a court of admiralty.

It is to be observed that by reason of their very nature many provisions of the "statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees" do not apply to actions by seamen, and cannot be made to apply, the fiat of Congress to the contrary notwithstanding.

A seaman is not concerned with defects in railroad tracks, cars, locomotives or roadbeds, provision for which is made in the section of the Employers' Liability Act hereinabove quoted. He is not concerned with driving-wheel brakes and safety ash pans on locomotives, automatic couplers and grab irons on railroad cars, or drawbars on freight cars, provision for which is made in the "Safety Appliance Acts" (U. S. Comp. St., 1918, Sections 8605-8650; 27 Stat. 531; 36 Stat. 298; 35 Stat. 476).

In these circumstances it is not too much to say that Congress understood that the sweeping language employed in this statute must of necessity be limited by many exceptions not therein expressed or suggested.

Without attempting to discuss the wisdom of this form of legislation, the result of it is plainly to cast upon the courts the burden of determining what changes in the maritime law were intended and effected.

Manifestly it was not intended to abrogate all principles theretofore recognized and enforced by courts of admiralty, statutory and otherwise.

It was not intended to wipe out the whole body of maritime law and procedure and substitute another completely new system in its place.

Rather it must have been intended to supplement the existing maritime law by importing into it additional rules to be applied in determining the liability or non-liability of the employer.

3. *The Status of §33 in our Maritime Jurisprudence has been settled by this Court.*

The true construction to be placed on Section 33 of the Merchant Marine Act, 1920, has been so recently laid down by this court in the case of *Panama Railroad Company* v. *Johnson*, 264 U. S. 375, that it would seem hardly necessary to labor at great length the question of the place which the Act finds in our maritime law.

Mr. Justice Van Devanter said in writing the opinion in that case at page 388 (italics ours):

> *"Rightly understood the statute neither withdraws injuries to seamen from the reach and operation of the maritime law, nor enables the seaman to do so. On the contrary, it brings into that law new rules drawn from another system and extends to injured seamen a right to invoke, at their election, either the relief accorded by the old rules or that provided by the new rules. The election is between alternatives accorded by the maritime law as modified, and not between that law and some nonmaritime system,"*

and again at pages 390, 391 (italics ours):

> "The course of legislation, as exemplified in §9 of the Judiciary Act of 1789, §§563 (par. 8) and

711 (par. 3) of the Revised Statutes, and §§24 (par. 3) and 256 (par. 3) of the Judicial Code, always has been to recognize the admiralty jurisdiction as open to the adjudication of all maritime cases as a matter of course, and to permit a resort to common-law remedies through appropriate proceedings *in personam* as a matter of admissible grace. *It therefore is reasonable to believe that, had Congress intended by this statute to withdraw rights of action founded on the new rules from the admiralty jurisdiction and to make them cognizable only on the common-law side of the courts, it would have expressed that intention in terms befitting such a pronounced departure,*— that is to say, in terms unmistakably manifesting a purpose to make the resort to common-law remedies compulsory, and not merely permissible. But this was not done. On the contrary, the terms of the statute in this regard are not imperative but permissive. It says 'may maintain' an action at law 'with the right of trial by jury,' the import of which is that the injured seaman is permitted, but not required, to proceed on the common law side of the court with a trial by jury as an incident. The words 'in such action' in the succeeding clause are all that are troublesome. But we do not regard them as meaning that the seaman may have the benefit of the new rules if he sues on the law side of the court, but not if he sues on the admiralty side. Such a distinction would be so unreasonable that we are unwilling to attribute to Congress a purpose to make it. A more reasonable view, consistent with the spirit and purpose of the statute as a whole, is that the words are used in the sense of 'an action to recover damages for

such injuries,' the emphasis being on the object of the suit rather than the jurisdiction in which it is brought. So we think the reference is to all actions brought to recover compensatory damages under the new rules as distinguished from the allowances covered by the old rules, usually consisting of wages and the expense of maintenance and cure. See *The Osceola*, 189 U. S. 158; *The Iroquois*, 194 U. S. 240; *Chelentis* v. *Luckenbach S. S. Co.*, 247 U. S. 372. In this view the statute leaves the injured seaman free under the general law—§§24 (par. 3) and 256 (par. 3) of the Judicial Code—to assert his right of action under the new rules on the admiralty side of the court. On that side the issues will be tried by the court, but if he sues on the common-law side there will be a right of trial by jury. *So construed, the statute does not encroach on the admiralty jurisdiction intended by the Constitution, but permits that jurisdiction to be invoked and exercised as it has been from the beginning.*"

The remarks quoted above from the decision in the *Panama Railroad* case seem to indicate that, in the court's opinion, Section 33 of the Merchant Marine Act, 1920, created new rules of liability as between seamen and shipowners, and thus that the substantive nature of the relationship and relative rights of seamen and shipowners were modified.

At the same time, moreover, it seems to be clear from this opinion that these rules of liability were enforceable, either at common law with a jury "as an incident", or in admiralty before the court.

The statute thus construed merely places seamen in a remedial status the same as that in which they have always been.

They could always bring a common law action to enforce their substantive rights and the shipowners' liability. The jury was not a part of the *right* conferred, but merely a part of the machinery of the remedy which would be granted when an action at law was brought.

On the other hand, a petition for limitation of liability is also a remedy which is available to the shipowner without in any way affecting the *rights* of the seamen under Section 33. All that is affected is the *form* of the seamen's remedy.

There has never been a right of trial by jury in the admiralty.

The Constitution originally did not give any trial by jury. Trial by jury was granted in the sixth amendment for criminal prosecutions, and in the seventh amendment for actions at common law in the federal courts in which the controversy exceeds $20.00 in amount.

Furthermore Congress in 1787, Revised Statutes 648, excluded juries from proceedings under equity and admiralty jurisdiction.

Decisions of this court have uniformly sustained this procedure.

Whelan v. *United States*, 7 Cranch. 112; affirming *The Vengeance*, 3 Dallas 297;
The Sarah, 8 Wheat. 391;
The Sally, 2 Cranch. 406;
The Betsey and Charlotte, 4 Cranch. 443.

Indeed, it would seem that inasmuch as the court has now construed Section 33 of the Merchant Marine Act to have become part of the maritime law, all question of any alleged *right* to a jury trial has been excluded.

Indeed, it is difficult to understand on what the alleged *right* to a jury trial, under such a situation as exists in this case, could be based, except on a constitutional provision.

So far as the admiralty court is concerned, there is not any such provision, and, consequently, when a shipowner is in a position to invoke an admiralty remedy in the admiralty court, the fact that a jury might be available in another forum seems to have nothing whatever to do with the matter.

4. *There was not any Repeal of the Limitation Act by Implication.*

The Merchant Marine Act does not expressly repeal the Limited Liability Law.

It does repeal certain enumerated acts and parts of acts, in five main subdivisions of Section 2, but no mention is made of the Limited Liability Law. Recourse may then be had to the well established rule (stated in *Soliss* v. *General Electric Co.*, 213 Fed. 204, 207):

> "• • • the enumeration of certain members of a class is the exclusion of all others of that class not enumerated, • • •"

and no doubt is left that Congress never intended to modify or repeal the Limited Liability Law.

When Congress in 1884 determined to exempt seamen's wages from the operation of the limited liability statute, (doubtless because they were regarded as personal contracts of the owner) it did so in specific terms and by appropriate amendment of said statute (U. S. Comp. St., 1918, Section 8028; 23 Stat. 57).

It is axiomatic that repeals by implication are never favored.

Frost v. *Wenie,* 157 U. S. 46, 58;
United States v. *Greathouse,* 166 U. S. 601, 605;
Washington v. *Miller,* 235 U. S. 422, 428;
Nichols & Cox Lumber Co. v. *United States,* 212 Fed. 588, 590;
Kemp Lumber Co. v. *Howard,* 237 Fed. 574, 576;
Franke v. *Murray,* 248 Fed. 865, 869;
Grahl v. *United States,* 261 Fed. 487, 492.

In *Arthur* v. *Homer,* 96 U. S. 137, 140, this court wrote:

> "To induce a repeal of a statute by the implication of inconsistency with a later statute, there must be such a positive repugnancy between the two statutes that they cannot stand together."

To find a repeal by implication, that implication must be the necessary deduction from the later statute.

Laws are presumed to be passed with deliberation and with full knowledge of all existing laws within the scope

of the proposed legislation, and it is but reasonable to conclude that the legislative body, in passing a statute, intended no interference with or abrogation of any former statute, unless the repugnancy between the two is manifestly irreconcilable.

Under the rule of implied repeals it must be impossible to execute both laws, before such repeal exists. If the two statutes can be construed so as to be reconcilable, that construction should be taken rather than one which effects repeal of the earlier law; the two statutes must stand together, and effect must be given to both.

Wilmot v. *Mudge*, 103 U. S. 217, 221;
Frost v. *Wenie*, 157 U. S. 46, 58;
United States v. *Healey*, 160 U. S. 136, 147;
United States v. *Greathouse*, 166 U. S. 601, 605;
United States v. *Lee Yen Tai*, 185 U. S. 213, 221;
Soliss v. *General Electric Co.*, 213 Fed. 204, 208;
Witte v. *Shelton*, 240 Fed. 265, 268;
Reo Atlanta Co. v. *Stern*, 279 Fed. 422, 424.

The two statutes here under consideration are not so hostile that both cannot stand. There is no such palpable repugnancy of the one to the other that a reading of the two acts together indicates an obvious intention of the legislative body that both could not remain in force at the same time.

The claim that acts giving new rights against or imposing new liabilities on shipowners have repealed in part, at least, the Limitation of Liability Acts is not a novel contention.

But in every instance where this contention has been made the courts have disapproved it.

Chappell v. Bradshaw, 35 Fed. 923, held that Section 18 of the Act of June 26, 1884, did not repeal by implication the preceding limited liability acts set forth in Revised Statutes, Sections 4282 to 4289.

At page 925, Judge Bond said:

> "* * * Where a subsequent statute can be so construed as not to bring it in direct conflict with an antecedent law, it will not be held by the courts to repeal the former statute. Repeals by implication are seldom allowed and to do so in this instance would be to do violence to the intention of Congress, which appears clearly to have been to extend the Act of 1851 to exempt ship owners from liabilities not embraced in that Act, but not to embrace another class of vessel owners."

In the case of *The Hoffmans*, 171 Fed. 455, it was contended that the Act of June 29, 1906, Chap. 3591, Sec. 7, 34 Stat. 595, which read:

> "That any common carrier, railroad, or transportation company receiving property for transportation from a point in one State to a point in another State shall issue a receipt or bill of lading therefor *and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it* or by any common carrier,

railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, *and no contract, receipt, rule or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed*; Provided, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law" (italics ours),

repealed the statute for limitation of liability as to any cases coming under it.

The case for an implied repeal was much stronger than the instant case, because Section 10 of the Act of June 26, 1906 provided:

> *"That all laws and parts of laws in conflict with the provisions of this Act are hereby repealed, but* the amendments herein provided for shall not affect causes now pending in courts of the United States, but such causes shall be prosecuted to a conclusion in the manner heretofore provided by law." (Italics ours.)

The court, Adams, J., held there was not any implied repeal of the limitation acts and said at page 465:

> "In the Middle Ages, the doctrine of limitation of liability of the owners of a vessel to their interests in its value and the value of its freight, arose. In *The Rebecca*, Fed. Cas. No. 11,619, 20 Fed. Cas. 373, decided in the District of Maine in 1831, Judge Ware treats the matter in an exhaustive manner. The first statutes of the United States upon the

subject were passed in 1851, and became known as the 'Limited Liability Acts'. They are found in Sections 4282-4289 of the Revised Statutes (U. S. Comp. St. 1901, pp. 2943, 2945). The policy of these acts is explained by Mr. Justice Bradley in *Norwich Co.* v. *Wright*, 13 Wall. 104, 121, 20 L. Ed. 585.

* * * * * *

"The Interstate Commerce Act aimed to correct certain abuses in the carriage of goods, principally by land, incidentally by water, but it was certainly not designed to overthrow the long established system of limitation of vessel-owners' liability in connection with water carriage. To suppose so, without any mention of the Act of 1851, would be a perversion of its obvious intent to correct the said abuses. I do not find any merit in the claim."

In *The Passaic*, 204 Fed. 266, the Circuit Court of Appeals for the Second Circuit held that the limited liability acts were not impliedly repealed by the Employers Liability Act of April 22, 1908.

The attitude of the courts in construing acts which are in *pari materia*, and, particularly, in following out the supposed intention of Congress to allow shipowners to limit their liability, as set forth in the various limited liability statutes, is clearly set forth in the words of Ward, C. J., at page 267:

"* * * If the limited liability acts and the acts regulating the liability of such railroads to their employees can be construed consistently with each other, so that both shall stand, they must be so

> construed. What shocks the mind is that whereas full compensation can be had in the case of employees of such a railroad company killed or injured on shore, often a partial compensation or none at all can be had in the case of employees killed or injured on a vessel of the railroad company. Still this is the very distinction which Congress has made and for many years permitted to stand between liability of defendants generally for loss of or injury to persons or property on shore and liability of vessel owners for the same injuries. The Acts of Congress regulating the liability of railroads to their employees do not affect the cause of action in any way, but abolish certain defenses, such as contributory negligence and assumption of risk. This is entirely consistent with previous legislation limiting the extent of the employers' liability for the cause of action."

In *Alaska Steamship Co.* v. *United States*, 259 Fed. 713, it was held by the Circuit Court of Appeals for the Second Circuit that no power was given to the Interstate Commerce Commission by the Interstate Commerce Act of February 4, 1887,

> " * * * to prescribe an inland bill of lading in form or substance depriving the carriers of the benefits of the statutes limiting the liability of vessel owners and of Harter Act of February 13, 1893, c. 105, 27 Stat. 445 (Comp. St. Sections 8029-8035). These statutes still survive, unless repealed by implication, and this result we are of the opinion, was neither intended nor accomplished." 259 Fed. 715.

It is true that this case was reversed in *United States v. Alaska Steamship Company*, 253 U. S. 113. But the reversal was based on the fact that the Transportation Act of February 28, 1920, passed pending the appeal, had rendered the questions involved below moot questions, and hence that this court would not deal with the question of an implied repeal of the limited liability statutes.

In the case of *Butler v. Boston Steamship Co.*, 130 U. S. 527, it was contended that the Act of February 28, 1871, entitled *"An Act to Provide for Better Security of Life on Board of Vessels Propelled in Whole or in Part by Steam, and for other Purposes"*, commonly called the Steamboat Inspection Act, 16 Stat. at L. 440, superseded or displaced the proceedings for limited liability in certain cases. The court said, at page 553 (italics ours):

"* * * We do not see the necessity of drawing any such conclusion. *The act itself contains no provision of the kind.* It requires certain precautions to be taken by owners of coasting steam-vessels and those engaged in navigating them to avoid as far as possible danger to the lives of passengers. Amongst other things, by the 51st Section of the Act (Rev. Stat., sec. 4401), it is provided that all coastwise seagoing steam vessels 'shall, when under way, except on the high seas, be under the control and direction of pilots licensed by the inspectors of steamboats.' By the 43d section (Rev. Stat. sec. 4493) it is declared that whenever damage is sustained by a passenger or his baggage,

the master and owner, or either of them, and the vessel shall be liable to the full amount of damage if it happens through any neglect or failure to comply with the provisions of the Act, or through known defects, etc. This is only declaring in the particular case, what is true in all, that if the injury or loss occurs through the fault of the owner, he will be personally liable, and cannot have the benefit of limited liability. *But it does not alter the course of proceeding if the claim of limited liability is set up by the owner.* * * *"

It is to be noted that section 33 of the Merchant Marine Act of 1920 does not contain language nearly so strong as that contained in the Act of February 28, 1871, under discussion by Mr. Justice Bradley. That act read in part (italics ours):

"Whenever damage is sustained by any passenger or his baggage, from explosion, fire, collision, or other cause, the master and the owner of such vessel, or either of them, and the vessel shall be liable to each and every person so injured, to the *full amount of damage if it happens through any neglect or failure to comply with the provisions of this title,* or through known defects or imperfections of the steaming apparatus or of the hull; and any person sustaining loss or injury through the carelessness, negligence, or wilful misconduct of any master, mate, engineer, or pilot, or his neglect or refusal to obey the laws governing the navigation of such steamers, may sue such master, mate, engineer, or pilot, and recover damages for any such injury caused by any such mas-

ter, mate, engineer or pilot. (R. S., Sec. 4493; Comp. St. 8269; Act. Feb. 28, 1871, c. 100, Sec. 43, 16 Stat. 453.)" (Italics ours.)

Section 33 of the Merchant Marine Act sets up a general rule that seamen shall have certain new substantive rights.

The limitation of liability statutes provide that, in cases where the total of the claim or claims exceeds the value of the ship and freight, that value shall represent the maximum amount for which the shipowner shall be liable.

Under usual and ordinary circumstances, and in the absence of an occasional and exceptional disaster such as that out of which the pending controversy arose, a seaman can take advantage of the provisions of the Merchant Marine Act and suffer nothing by reason of the Limited Liability Law.

Only in a small fraction of the total number of cases is injury to or death of a seaman accompanied by destruction of the vessel, partial or complete, or by a number of other casualties giving rise to claims aggregating an amount in excess of the value of the vessel and her freight.

His possible collision with the Limited Liability Law is fairly analogous to any creditor's position with reference to the bankruptcy statutes; the creditor has a general right to collect in full, but under certain special circumstances he is restricted to a *pro rata* share in a limited fund.

The application of the Limited Liability Law is not confined to cases involving claims of seamen.

It applies to cases involving claims of passengers (*Butler* v. *Boston Steamship Co.*, 130 U. S. 527; *Craig* v. *Continental Ins. Co.*, 141 U. S. 638; *The Titanic*, 233 U. S. 718), of owners of another ship sunk in collision (*Norwich Company* v. *Wright*, 13 Wall. 104; *The Scotland*, 105 U. S. 24), of shippers (*Providence & N. Y. S. S. Co.* v. *Hill Manufacturing Co.*, 109 U. S. 578), of salvage claimants (*The San Pedro*, 223 U. S. 365), of stevedores (*The Harry Hudson Smith*, 142 Fed. 724; *Flynn* v. *Christenson*, 273 Fed. 385), of the government of the United States (*United States* v. *Hamburg-Amerikanische Packetfahrt Actien Gesellschaft*, 212 Fed. 40), of owners of a bridge struck by a barge and of any claimants seeking damages for a non-maritime tort (*Richardson* v. *Harmon*, 222 U. S. 96). "It extends to liability for every kind of loss, damage and injury." *Butler* v. *Boston Steamship Co.*, 130 U. S. 527.

These various parties—passengers, owners of other ships, shippers, salvage claimants, stevedores, the government, bridge owners, and even a pedestrian on shore struck by a flying fragment of an exploded boiler—must come into a limitation proceeding to assert their claims, although quite obviously they would have no concern with any of the provisions of the Merchant Marine Act.

Also, as hereinabove pointed out, the great majority of injured seamen would never be in collision with the Limited Liability Law.

There is then no identity between the field of operation of the one statute and that of the other which could serve as a basis for a conclusion that the later act was intended to repeal the earlier.

Both laws are possible of execution in their respective spheres and effect must be given to both.

Passengers and the other classes hereinabove enumerated have a right to a jury trial and full indemnity, but that right is always held subordinate to a shipowner's right to limit his liability.

Now, when a seaman is in terms given a right to a jury trial and full indemnity, it is presumably for the purpose of granting him rights *equal* to those of the other classes.

The Jones Act is without words of preference which would indicate an intent to grant him *greater* rights. The provision as to jury trial was put in to make it clear that the new maritime law was to be enforced on the common law side of the court, and that the usual defences should not apply in seamen's cases in common-law courts.

A general group, embracing all classes except seamen, enjoyed certain rights subject to certain limitations, and Congress by the Merchant Marine Act included the excepted class in that general group.

The seaman is then on the same plane as the other members of that general group. If he sues at common law he has the usual right to a jury trial and full indemnity, but that right is subject to a shipowner's right to limit his liability in a proper case by a proceeding in admiralty.

The two statutes are repugnant to each other only in the sense that the ordinary remedies exercisable under the later will under certain special circumstances be stopped by the extraordinary remedy provided in the earlier. But those same remedies, when exercised by a general group to which seamen have now been expressly joined, have for seventy-three years suffered that identical curtailment with the express sanction of this court.

Adverting to the presumption that laws are passed with deliberation and with full knowledge of all existing laws within the scope of the proposed legislation, it is but reasonable to conclude that Congress, when it passed the Jones Act and thereby included seamen within the general group possessed of a right to jury trial and full indemnity, was well aware of the curtailment or limitation to which that right had for almost three-quarters of a century been subjected; and that, Congress having failed to insert words of preference indicative of a desire to favor seamen over other members of the group, no interference with or abrogation of that statutory limitation was intended.

The principle of limitation of liability of shipowners has, indeed, now become such an ancient and fundamental part, not only of our own maritime jurisprudence, but as above noted of the jurisprudence of all maritime nations, that it is perhaps appropriate to recall in this connection what Sir Matthew Hale, Lord Chief Justice of the King's Bench, 1671-1676, the earliest great historian of English Law, said of old laws in his "*Considerations*

Touching the Amendment or Alteration of Laws," Hargrave's Law Tracts, 253-289.

At page 254 he said (italics ours):

> "Ancient laws that have a common concern, are not the issues or the produce of this or that council or senate, but they are the production of the various experiences and applications of *the wisest thing in the inferior world—to wit, Time.*"

To show how our Senate dealt with this law, and to emphasize a hundred fold the wisdom of Sir Matthew Hale's remarks, we have prepared and annexed hereto as *Appendix VI* hereof a statement of all the proceedings had in the Congress and its committees regarding the amendment of Section 20 of the Seamen's Act by Section 33 of the Merchant Marine Act, 1920.

It shows quite clearly that it was not intended that the Limited Liability Act should be affected by this amendment, but merely, as its proponent claimed, to do away with the rule of assumption of risk and the doctrine of fellow servant.

As the record shows, the amendment seems to have been passed with very little consideration.

It would be singular, indeed, if a casual act of this kind should be held to have overturned our settled maritime policy of limitation of liability for shipowners, which has existed and been enforced now, for almost seventy-five years.

The appellee has argued that Section 6 of the Federal Employers' Liability Act, forbidding removal of a case arising under the act from a state to a federal court, is

incorporated by reference into the Merchant Marine Act, and that appellant's proceeding to limit its liability is a removal.

The answer is obvious. Appellant's proceeding is not a removal of the appellee's state court action; it is an entirely new proceeding in a new forum in arrest of that state court action.

In *Providence & N. Y. S. S. Co.* v. *Hill Manufacturing Co.*, 109 U. S. 578, this court, in disposing of the argument that inconveniences may arise from arresting the prosecution of separate suits, said at page 596:

> "Nor is the inconvenience any greater than that which occurs when a case is removed from the State to a federal court. In that case, on the presentation of a petition for removal, * * * the law declares 'It shall then be the duty of the State court to * * * proceed no further in such suit.' In the case before us, as well as in the cases of bankruptcy and of removal, the parties have a right", etc.

This language indicates beyond question that a limitation proceeding is a thing separate and distinct from a removal.

It is then unnecessary to consider appellee's argument that Section 6 is incorporated in the Jones Act; although it may be noted that an action at law in a state court, brought by a seaman under that act, has been held removable into a federal court.

Wenzler v. *Robin Line S. S. Co.*, 277 Fed. 812.

The limitation of liability acts deal with remedies, not with substantive rights.

In the case of *Butler* v. *Boston Steamship Co.* 130 U. S. 527 (1888), Mr. Justice Bradley in speaking of a personal injury case which had been brought against the steamship company, said at page 552:

> "* * * Had the action of the appellants been first commenced, it would have been suspended by the institution of the limited liability proceedings; and the very object of those proceedings was, not only to stop the prosecution of actions already commenced, but to prevent other suits from being brought. Allegations that the owners themselves were in fault cannot affect the jurisdiction of the court to entertain a cause of limited liability, for that is one of the principal issues to be tried in such a cause. The beneficent object of the law in enabling the ship-owner to bring all parties into concourse who have claims arising out of the disaster or loss, and thus to prevent a multiplicity of actions, and to adjust the liability to the value of the ship and freight, has been commented on in several cases that have come before this court, notably in the cases of *Norwich Company* v. *Wright*, 13 Wall. 104, and *Providence and New York Steamship Co.* v. *Hill Man'f'g Co.*, 109 U. S. 578. It is unnecessary to enter again upon the discussion here."

Again, after holding that the Steamboat Inspection Act, February 28, 1871 did not repeal the statute by implication, Mr. Justice Bradley said at page 553:

> "* * * But it does not alter the course of proceeding if the claim of limited liability is set up

by the owner. If, in those proceedings, it should appear that the disaster did happen with his privity or knowledge, or, perhaps, if it should appear that the requirements of the steamboat inspection law were not complied with by him, he would not obtain a decree for limited liability; that is all. We say 'perhaps', for it has never yet been decided, at least by this court, that the owner cannot claim the benefit of limited liability when a disaster happens to a coast-wise steamer without his fault, privity, or knowledge, even though some of the requirements of the steamboat inspection law may not have been complied with. * * *"

In the case of *The Titanic,* 233 U. S. 718, in dealing with the question of limitation of liability statutes, Mr. Justice Holmes said on page 733:

"* * * This statute well might be held to announce a general policy, governing both obligations that arise within the jurisdiction and suits that are brought in the courts of the United States. *Emery* v. *Burbank,* 163 Massachusetts 326, 328. It clearly limits the remedy, as we have shown, in cases where it has nothing to say about the rights. With the explanation that we have made we may repeat here Justice Bradley's words: 'The rule of limited responsibility is now our maritime rule. It is the rule by which, through the Act of Congress, we have announced that we propose to administer justice in maritime cases.'"

On reflection, therefore, when it is remembered that the petition for limitation of liability is merely a form of remedy in Admiralty available to the shipowner in a

proper case, it will be realized that when such a case arises the shipowner should be entitled to avail himself of the remedy, even though it may take away from others the "incident" of trial by jury which they otherwise might have in another forum.

It must be remembered also that seamen are regarded as peculiarly the wards of the admiralty court. There are no decisions in the hundreds of seamen's cases which have come before our admiralty courts in the past which should cause a seaman to fear that in an admiralty court he would suffer any diminution of his rights.

By being brought into a limitation of liability proceeding, a seaman is merely being brought into his proper forum—an admiralty court.

There are, as has been said above, many cases in which the remedies of a seaman under Section 33 of the Merchant Marine Act will not be affected by the shipowner's remedy under the limitation of liability acts.

But in those cases where the seaman's remedy is affected it must give way because a wise public policy to encourage shipping laid down by Congress in the limitation of liability acts, repeatedly approved by this court, and *reiterated in the Merchant Marine Act itself*, demands that the shipowner shall have the remedies given to him by the limitation of liability acts.

If the whole question here involved comes to be regarded as a chancering of public policies, certainly, in the face of the recitals in the Merchant Marine Act, it cannot fairly be contended that the public policy of the

United States is to discourage and embarrass American shipowners, as would be the case if the contention of the appellee in this case should be sustained, and it should be held that Section 33 of the Merchant Marine Act was an implied repeal of the Limitation of Liability Acts in so far as seamen's claims against American shipowners are concerned.

For, as has been above noted, *owing to the venue provisions of §33 only American shipowners properly are affected by the section.*

CONCLUSION.

THE FIRST CERTIFIED QUESTION SHOULD BE ANSWERED IN THE AFFIRMATIVE AND THE SECOND IN THE NEGATIVE.

Respectfully submitted,

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